No. 11820

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TAVARES CONSTRUCTION COMPANY, INC., a corporation, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellees.

TAVARES CONSTRUCTION COMPANY, INC., a corporation, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing of Appellants Tavares Construction Company, Inc., a Corporation, Concrete Ship Constructors, a Joint Venture, Stroud-Seabrook, a Copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates.

JOHN M. MARTIN,
FRANK L. MARTIN, JR.,
725 Petroleum Building, Los Angeles 15,
Attorneys for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable United States Court of Appeals for the Ninth Circuit:

Come now your petitioners Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a

joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, appellants and defendants, hereinafter called Constructors, and respectfully petition for a rehearing in the above case, in which the opinion was filed on the 16th day of June, 1949, and as grounds for rehearing, assign the following:

I.

The Court Erred in Holding That Constructors' Leasehold Estate and Option Were Not Condemned or Taken in This Proceeding.

This action was originally commenced for the purpose of acquiring land for the site of a shipyard for use by Constructors [R. 20]. Two declarations of taking were filed. The first took the title to all parcels excepting Parcel 1 [R. 28-32]. Plancor 407 was not specifically mentioned therein [R. 29]. The second was an amended declaration and covered all parcels [R. 42-46]. It specifically mentioned Plancor 407 therein [R. 43].

The filing of an amended declaration of taking as to all parcels and the mention therein of Plancor 407 indicated an intent to take not only the additional Parcel 1 but also the interests of Constructors under Plancor 407 as to all of the parcels.

Shortly thereafter an amended and supplemental complaint was filed [R. 249-258] which contained the same description as to the property and interests therein sought to be condemned as was set forth in the amended declaration of taking [R. 253-255]. The filing of the amended and supplemental complaint certainly indicated an intent to take something in addition to that contemplated by the

original complaint. If Constructors' interests under Plancor 407 were not intended to be taken thereby, then there was no necessity for an amended and supplemental complaint, or for an amended declaration of taking. If all that was intended to be taken by the amended declaration of taking was National City's interest in Parcel 1, then it would have been Declaration of Taking No. 2, which would have been in the same language as Declaration of Taking No. 1, and described only Parcel 1.

To eliminate any uncertainty as to whether or not it was the intent of the amended declaration of taking and the amended and supplemental complaint to take and condemn Constructors' interests under Plancor 407, Constructors made a motion for a more definite statement [R. 259-264]. This motion was granted [R. 265], and the United States filed a bill of particulars which made it certain that the United States by its amended and supplemental complaint sought to take and condemn all of Constructors' interests [R. 266-267].

Thereafter on pre-trial the court interpreted the pleadings and ruled that Constructors' lease and option rights had been taken and condemned by this action and that Constructors had a compensable interest in the property taken by this condemnation proceeding [R. 310].

The action thereafter proceeded to trial upon that theory and understanding by the trial court and both parties [R. 311-312]. No contention was made by either party or the trial court that Constructors' leasehold estate under Plancor 407 had not been condemned or taken by this proceeding. On the contrary, it was stipulated by the parties that December 23, 1944, was the date of taking of

Constructors' lease, coupled with an option [R. 401], which was the date of the filing of the amended declaration of taking.

The trial court entered judgment finding that Constructors' leasehold and option rights under Plancor 407 had been condemned and taken by this proceeding, that title thereto was vested in the United States, and that Constructors' lease and option covered all twelve parcels [R. 314, 317, 319, and 327]. Later the trial court corrected the judgment by striking the word "option" therefrom [R. 389 and 1418 to 1448].

On appeal neither party has contended that Constructors' rights under Plancor 407 were not taken. On the contrary, both parties in their briefs have taken the position that Constructors' leasehold estate and option had been taken and condemned by this proceeding. (See Brief of Constructors, p. 10, and Brief of United States, pp. 3 and 6.) In connection with the pre-trial, a stipulation of the parties was filed by which it was stipulated that subsequent to the entry of the decree on the declaration of taking that the Navy Department took physical possession of a major portion of the site and destroyed approximately one-third of the improvements and facilities [R. 299]. Such conduct on the part of the Government clearly indicates that the Government intended to take Constructors' rights by the declaration of taking.

This court has decided this case upon a point that was not only not raised by either party on the appeal but which was expressly conceded by both parties not to be an issue in the case, and upon a theory contrary to that on which it was tried and contrary to the understanding of the trial court and the parties of the pleadings. In

doing so the court erred. In support thereof we submit the following authorities:

Martin v. Imbrie (C. C. A. 7th), 262 Fed. 44.

Syllabus—"Where a case is tried on a theory that a particular matter is within the issues, it cannot be contended on appeal that such matter was without the pleadings."

Meyer v. W. R. Grace & Co. (C. C. A. 7th), 290 Fed. 785.

Syllabus—"Where the trial court's theory as to the effect of the pleadings was not objected to by defendants, they could not urge such an objection on writ of error."

Houle v. Helena Gas & Elect. Co. (C. C. A. 9th), 31 F. 2d 671.

Syllabus—"Practical construction of complaint by court, which construction was accepted by parties throughout the trial will be accepted by the Appellate Court."

This court has further erred in that its decision is based solely upon an interpretation of the amended declaration of taking without considering the amended and supplemental complaint and bill of particulars. There can be no doubt but that it was intended by the amended declaration of taking to take Constructors' leasehold estate when the amended declaration of taking is read in the light of the fact that it was an amended declaration of taking, which specifically mentioned Plancor 407 and repeated the description of all of the parcels, and when also considered with the fact that a supplemental complaint was thereafter filed, together with the clarification thereof by the bill of particulars.

In any event it was clearly sought by the amended and supplemental complaint as clarified by the bill of particulars to condemn Constructors' leasehold estate under Plancor 407 [R. 266, 267]. Rule 12(e) of the Federal Rules of Civil Procedure provides among other things: "A bill of particulars becomes a part of the pleading which it supplements." This proceeding was instituted at the instance of the Maritime Commission [R. 6 and 252] and at the time of the hearing upon the motion for the bill of particulars counsel for the United States submitted to the court a letter written by the Solicitor for the Maritime Commission to the Attorney General advising that it was "the intention of the Maritime Commission to acquire full title to the land and all improvements thereon, and thereby to acquire any and all rights in and to said land and improvements other than those of the United States or its agent, Defense Plant Corporation" [R. 280].

Section 258a of Title 40, U. S. C. A., authorizing the filing of a declaration of taking, is permissive only and does not make inoperative Section 258, the Conformity Act, *United States v. 76800 Acres, etc.* (D. C., Ga., 1942), 44 Fed. Supp. 653. Section 258a is not a complete condemnation statute, but merely supplements existing legislation by granting the United States the power to secure immediate title. (*United States v. 17280 Acres, etc.* (D. C., Neb., 1942), 47 Fed. Supp. 267. The filing of a declaration of taking is optional with the Government and purely incidental to the main proceeding. (*United States v. 26.3765 Acres, etc.* (D. C., N. Y., 1945), 62 Fed. Supp. 910.) It is an ancillary proceeding. (*Polson Logging Co. v. U. S.* (C. C. A. 9th, 1945), 149 F. 2d 877.)

We submit that what is sought to be condemned by an action should be determined from the pleadings. Section 258, 40 U. S. C. A.; Section 1224, California Code of Civil Procedure; *U. S. v. Certain Parcels of Land in City of Los Angeles* (D. C. S. D. Cal., 1945), 62 Fed. Supp. 1017. If a declaration of taking is filed which by its terms takes a lesser interest than that included in the pleadings, the effect thereof is to vest title immediately in the United States to the extent indicated by the declaration of taking and to leave the remaining interest to vest on the entry of judgment in the action. In this case all of Constructors' interests and rights under Plancor 407 were taken and condemned by the pleadings. It is also clear that the United States took and condemned all of Constructors' interests and rights under Plancor 407 by the amended declaration of taking. It was stipulated by the parties at the time of trial that December 23, 1944, was the date of taking of Constructors' lease, coupled with an option [R. 401]. The parties interpreted the amended declaration of taking as taking Constructors' leasehold estate and option rights under Plancor 407, and we believe this court is bound by the interpretation placed thereon by the parties. The amended declaration of taking took the "fee simple absolute" title, excepting only the title which had already vested in the United States or its agent Defense Plant Corporation. This completely divested Constructors of their interests. (See *United States v. Sunset Cemetery Co.* (C. C. A. 7th, 1943), 132 F. 2d 163.

II.

The Court Erred in Holding That the Site Was Limited to Parcel 1.

This holding was based upon the court's erroneous assumption that what was included in the word "Site" in the original Plancor 407 was not changed by any of the amendments thereto. The court has evidently overlooked Amendment No. 5 [R. 87-89] to Plancor 407 made November 11, 1942, being the day following the commencement of the condemnation action. This amendment recited the need for additional facilities and provided:

* * * * * * * *

"Whereas, the Government is proceeding to acquire title to additional land to be used as a part of the Site for the facilities * * * (such land and the balance of the land heretofore constituting the Site being hereinafter referred to as 'the Site'); and

Whereas, upon acquisition of title to such additional land by the Government the Maritime Commission has indicated that it will cause the same to be conveyed to Defense Corporation upon receipt of payment of the cost thereof;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said Agreement of Lease entered into on December 27, 1941, by and between Defense Corporation and Lessee, as amended, be and the same hereby is further amended in the following particulars:

* * * * * * * *

Thirteen: In consideration of the covenants herein contained, and as rental for the Site, Facilities and Machinery (in addition to the rental for that part of the Site which Lessee leased from National City, California, * * *), Lessee agrees to pay to Defense Corporation * * *.

By adding thereto the following new paragraph Thirty-one:

Thirty-one: Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease, dated December 27, 1941, as amended, shall be further amended so as to provide for an increase in the maximum amount of expenditures to be made by Defense Corporation in the amount of the cost thereof to Defense Corporation (which amount shall not exceed the cost thereof to the Government), and an increase in the amount of rental to be paid by Lessee under said Agreement of Lease, as amended, in an amount sufficient to cover the cost of such part of the Site. Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the Government pursuant to paragraph Twenty-six thereof prior to the acquisition by Defense Corporation of title to that part of the Site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by paragraph Fifteen of said Agreement of Lease, as

amended, pay to the Government the cost to it of such part of the Site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended.

* * * * * * *" [R. 87-89]

From the foregoing it is clear that the word "Site" as used in the original Plancor was amended to include not only the original site, but all of the land involved in the condemnation action. Means were provided for Defense Corporation to acquire title to all of the land being condemned and when it did acquire such title Plancor 407 was to be further amended so as to add the cost thereof to the total expenditures to be made under Plancor 407. This automatically increased the option price for the Site under Paragraph Fifteen of Plancor 407. In the event Defense Corporation transferred Plancor 407 to another branch of the Government before Defense Corporation acquired title to the land being condemned, then in the event Constructors exercised their option, they were to pay to the Government the cost to it of that part of the Site being condemned.

On October 3, 1944, the fee title to Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A vested in the Government. On December 23, 1944, title to Parcel 1 vested in the Government. Thus when Constructors' interests were taken, title to these lands was in the Government. The Government was the principal, and Defense Corporation and the Mari-

time Commission were its agents. The condemnation by the principal was instituted by its agent the Maritime Commission for the benefit of its agent Defense Corporation. The Government is bound by the acts of its agents. Constructors acted on their promises and, in good faith and in reliance thereon, constructed shipyard facilities on the land being condemned, with the understanding that they did have a leasehold interest thereon and an option to purchase the fee title to all twelve parcels and all facilities and machinery thereon. The Government has not denied this, but on the contrary has affirmatively taken the position throughout this proceeding that Constructors had a valid and enforceable leasehold estate on all twelve parcels of land, together with the facilities and machinery located thereon, and an option to purchase the fee title to the whole thereof. It was so agreed by the parties in the pre-trial stipulation [R. 298-299]. We do not see how this court can take a contrary view. Certainly all of these agreements meant something and were not mere idle words and surplusage.

The error in the decision as to the extent of the "Site" should be corrected, even though the court is still of the opinion that Constructors' interests were not taken, in order to avoid any possible prejudice to such rights as Constructors may have under Plancor 407 in some other proceeding.

III.

Constructors' Option to Purchase the Site, Facilities and Machinery Was Condemned and Taken in This Procedure.

The court states that there is no contention or basis for contending that the Facilities and Machinery which were located on the site and were personal property were condemned or taken in this proceeding. This is true in the sense that there was no direct condemnation thereof, because title thereto was already vested in the Government under the terms of Plancor 407.

However, Plancor 407 was a leasehold estate on land and personal property. One of the covenants in that lease was an option to purchase not only the fee title to the site and the improvements to the site that were a part of the land, but also the personal property located thereon and belonging to the Government. When that leasehold estate was condemned and taken, all of the covenants of the lease went with it. In determining the value of the leasehold estate, the existence of the option is a matter to be considered by experts in determining the value of the property taken, which is a question of fact for the trial court. *United States v. Sunset Cemetery Co.* (C. C. A. 7th, 1943), 132 F. 2d 163; *Brooklyn Eastern Dist. Terminal v. City of New York* (C. C. A. 2d, 1944), 139 F. 2d 1007; *Westchester County Park Commission v. United States* (C. C. A. 2d, 1944), 143 F. 2d 688; *Brooks-Scanlon Corporation v. United States* (1924), 265 U. S. 106; Opinion of Judge Yankwich on Pre-Trial [R. 307-309].

Thus in determining the value of the leasehold estate, the added value to the lease given by the option to purchase

the Site, Facilities and Machinery, must be considered, and it is immaterial whether such option to purchase involves real or personal property or both. Here the option involved both, but under the terms thereof, it was "to purchase all but not part of the Site, Facilities and Machinery" [R. 58]. It was therefore not severable.

We submit that when this leasehold estate was taken, that all of Constructors' option rights were also taken and that those option rights embraced the fee simple title to all twelve parcels of land and all facilities and machinery located thereon. Both parties have so contended in their briefs.

IV.

The Court Erred in Holding That Constructors' Contracts With the Maritime Commission Were Not Contracts With the Government.

The United States Maritime Commission is an agency of the Government (46 U. S. C. A., Sec. 1111). In any event the words "contracts with the Government" were used in Plancor 407 by the parties as including contracts with the Maritime Commission. Plancor 407 was entered into at the instance of the Maritime Commission (see Article 2 of the first concrete barge construction contract between the Commission and Constructors dated November 27, 1941) [R. 99]. Plancor 407, dated December 27, 1941, refers to the Maritime Commission [R. 49] and recites that Constructors have entered into a "contract or contracts with the Government for the construction of concrete barges" and speaks of "the price charged the Government for the construction of such barges" [R. 50]. These contracts were with the Maritime Commission.

We submit that all of the contracts of Constructors with either the Maritime Commission or Defense Plant Corporation, shown by the record, were Government contracts. They were made by Government agencies, for Government purposes, and involved the expenditure of Government moneys. This court should take judicial notice of the fact that all contracts with a Government agency are commonly and customarily referred to as Government contracts. No contention has been made by the United States that Constructors' contracts with the Maritime Commission were not Government contracts.

V.

The Court Erred in Vacating Paragraphs 9 and 11 of the Judgment.

Paragraph 9 of the judgment relates to all parties to the action. Furthermore it is correct and should remain therein.

Paragraph 11 of the judgment is correct and should remain therein.

Paragraph 10 of the judgment should be vacated and the case remanded to the trial court for a new trial on the issue of just compensation for the condemnation and taking of all of Constructors' leasehold and option rights under Plancor 407.

The order of this court is uncertain in that while it vacates paragraphs 9, 10, and 11 of the judgment, it leaves the recitals [R. 311-313] and Findings I, VII, X, and XI in the judgment [R. 314-320] to the effect that Constructors had leasehold and option rights on all of the property and that such rights were taken and condemned by this proceeding.

Conclusion.

Appellants (Constructors) pray that a rehearing be granted, that the judgment of the trial court be reversed and the cause remanded to the trial court for a new trial on the issue as to the amount of just compensation to be awarded to Constructors.

Respectfully submitted,

JOHN M. MARTIN,
FRANK L. MARTIN, JR.,
Attorneys for Petitioners.

Certificate of Counsel.

I, the undersigned, Frank L. Martin, Jr., one of the attorneys for petitioners herein, hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

FRANK L. MARTIN, JR.